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RECENT DEVELOPMENTS IN THE LAW RELATING TO TRANSFERS OF UNDERTAKINGS

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1. Introduction

Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings¹ is one of the most contentious directives in the sphere of social policy. So far, the European Court of Justice has handed down 34 judgments on this Directive alone (31 preliminary references and 3 direct actions) and the Community legislature has already intervened twice to amend and consolidate the Directive.² This article focuses on the way the law has evolved since 1998.³

This article is divided into three main parts and considers both the interpretation of the Directive by the Court and its amendment by the Community legislature. The first part deals with the general evolution of the scope of the Directive. The meaning of "transfer of an undertaking" has so far been the question most subject to litigation. The Court has tried to strike a suitable balance between the need to protect employees' rights on the transfer of an undertaking and the need to ensure the competitiveness and economic efficiency of undertakings. The second part of this article also deals with the scope of the Directive. However, the focus is more specifically on the relationship between the law of transfers and other areas of law: competition law and public procurement, public law and insolvency law. Again, it will be argued that the balance is difficult to find, and still often remains to be found. Finally, the rights protected under the Directive and the remedies available for its breach are addressed.

* Selwyn College, Cambridge. I would like to thank Professor Piet Eeckhout and Dr Andrea Biondi for their comments.

1. Subsequently referred to as "the Directive". O.J. 1977, L 61/26.

2. Directive 98/50, O.J. 1998, L 201/58, and Directive 2001/23, O.J. 2001, L 82/16.

3. For an account of the law as it stood in 1993 and in 1998, see De Groot, "The Council Directive on the safeguarding of employees' rights in the event of transfers of undertakings: an overview of the case law", 30 CML Rev. (1993), 331 and "The Council Directive on the safeguarding of employees' rights in the event of transfers of undertakings: an overview of recent case law", 35 CML Rev. (1998), 707.

2. The general scope of the Directive . . . yet again!

The Court has been interpreting Article 1(1) on the scope of the Directive and dealing with the general question of whether the transfer of an undertaking has taken place ever since 1986. The state of its case law was nevertheless particularly unclear in 1997 after its decisions in the cases of *Schmidt*⁴ and *Süzen*.⁵ A reminder is useful to understand the evolution of the Court's case law since then.

2.1. *The Court's case law up to 1997*

In 1986, in *Spijkers*,⁶ the Court gave its first ruling on the meaning of "the transfer of an undertaking". The decisive criterion is whether there is "an economic entity that retains its identity". An overall assessment is required: all the circumstances characterizing the transaction must be taken into account and no factor is decisive on its own. The Court insisted that national courts should make the necessary factual appraisal in the light of the interpretation criteria it had set out. Nevertheless, as the Court had not given a clear definition of "the transfer of an undertaking", national courts felt uncertain and referred more and more cases asking detailed questions of facts. Moreover, the question arose as to whether atypical forms of transfers such as contracting out should fall within the scope of the Directive.

The Court changed its approach in 1994, in *Schmidt*, and ruled not on whether the Directive was applicable, but on whether the Directive was to be applied to the specific case referred to it. In this case, the Court did not follow its usual "shopping list approach"⁷ as in previous cases but held instead that the similarity of the activity was conclusive. It is surprising that the Court gave an overriding priority to the similarity of activity in assessing whether a transfer had taken place, whereas it had stressed in *Spijkers* that no factor was decisive on its own. *Schmidt* has been strongly criticized in several Member States, in particular in Germany and France,⁸ where it was thought

4. Case C-392/92, *Schmidt*, [1994] ECR I-2435.

5. Case C-13/95, *Süzen*, [1997] ECR I-1259.

6. Case 24/85, *Spijkers*, [1986] ECR I119.

7. McMullen, "Contracting out and market testing – The uncertainty ends?", 23 ILJ (1994), 230.

8. In France, for example, the *Cour de cassation* clearly refused to apply the *Schmidt* ruling in the later case of *Sonevie* (Ch. Soc., 13 Dec. 1995). See also academic writings: Waquet, "L'application par le juge français de la directive communautaire du 14 février 1977", *Droit Social* (1995) 1007; Pochet, "L'apport de l'arrêt *Schmidt* à la définition du transfert d'une entité économique", *Droit Social* (1994) 931; Déprez, "La notion de transfert d'entreprise au sens de la directive européenne du 14 février 1977 et de l'article L.122-12 al. 2 du code du travail: jurisprudence française et communautaire", *RJS* (1995) 314.

that it would have counterproductive results by putting too heavy a burden on employers.

These pressures prompted the Court to review its position in *Süzen*. The Full Court held that there could be no transfer of an undertaking if neither significant assets nor a major part of the workforce, in terms of their number and skills, had been transferred. The similarity of activity is not sufficient for the Directive to apply. The judgment of the Court in *Süzen* was well received in Member States such as France.⁹ Nevertheless, it gives rise to several objections. Firstly, the requirement of the transfer of assets is arbitrary from the employees' point of view.¹⁰ Moreover, the assets test is one which, in the context of the contracting out of services, offers the transferor and the transferee some scope for structuring their agreements so as to avoid the impact of the Directive.¹¹ Furthermore, the requirement that the taking over of the workforce must be assessed quantitatively ("in terms of their number. . ."), as well as qualitatively ("... and skills"), is also difficult to support. Indeed, it gives the transferee a good incentive not to employ the transferor's employees, even in situations where he could have employed some of them. Such a result is paradoxical, since it militates against the protection of employees' rights that the Directive purports to achieve. Finally, the Court referred to its previous case law as if it intended to clarify it, but failed to do so. In particular, the Court relied on *Schmidt* in paragraph 8 (the similarity of activity is sufficient) while adopting a contrary reasoning from paragraphs 9 to 16 (either assets or employees must transfer). A distinction on the facts was most unlikely, as confirmed by the Court itself in *Hernandez Vidal*.¹² It is true that the question of contracting out is difficult. This is especially so as this question had not been tackled by the Community legislature (presumably because of the disagreement between Member States). However, if Community law is to be effective, why would the Court rely on cases that may no longer be good law?¹³

9. Case of *MGEN*, Cour de cassation (Ch.Soc., 7 July 1998), where the *Cour de cassation* used the exact words of the Court in *Süzen*.

10. Davies, "Taken to the cleaners? Contracting out of services yet again", 26 ILJ (1997), 193, at 196 ("if workers are needed to tip the same dustbins as before the transfer but into refuse vehicles the transferee had lying around unused, that will count against the Directive applying; whereas if the transferee had taken over the transferor's vehicles, that will bring the Directive into play").

11. This is reinforced by the fact that the Court, contrary to what it had done in previous cases, required that the assets transferred be "significant".

12. Joined Cases C-127/96, C-229/96 & C-74/97, *Hernandez Vidal*, [1998] ECR I-8179.

13. There is some disagreement as to whether *Schmidt* has been overruled by *Süzen*. For an alternative explanation of the scope of the *Schmidt* ruling, see e.g. McMullen, "Atypical transfers, atypical workers and atypical employment structures – A case for greater transparency in transfer of employment issues", 25 ILJ (1996), 286. The fact that the debate on what

2.2. *The amendment of the Directive*

That was the state of confusion in which the Court's case law stood in 1997. One year later, the Community legislature finally amended Article 1(1) of the Directive. Sub-paragraph (b) was added in an attempt to define the phrase "transfer of an undertaking": "there is a transfer within the meaning of this Directive where there is the transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity". It is remarkable how similar this wording is to that used by the Court in *Süzen*. By stressing that an economic activity was not enough to constitute an undertaking, the legislature probably intended to reduce the discretion of the Court in defining the transfer of an undertaking while at the same time endeavouring to accommodate Member States such as France and Germany. Not surprisingly, this legislative intervention did not help to clarify what could constitute "the transfer of an undertaking", as testified by the refusal of several national courts to withdraw their requests for preliminary rulings from the Court's register despite its invitation to do so. However, the aim of the amendment as stated in the Preamble was precisely guided by the fact that "considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case law of the Court. Such clarification has not altered the scope of [the Directive] as interpreted by the Court of Justice".¹⁴ It is interesting to note that confusion in the case law of the Court is acknowledged but at the same time that the new version of the Directive implements the case law of the Court on the interpretation of its scope.

Before turning to the Court's case law since 1997, it is worth mentioning at this stage that the scope of the Directive has been amended in another respect. It is true that the Community legislature decided not to lay down a Community definition of employee. Article 2(1)(d) clearly states that "'employee' shall mean any person who, in the Member State concerned, is protected as an employee under national employment law".¹⁵ This follows the trend adopted by the Court in its early cases.¹⁶ However, Article 2(2) has been added:

"Member States shall not exclude from the scope of the Directive contracts of employment or employment relationships solely because:
(a) of the number of working hours performed or to be performed,

constitutes the transfer of an undertaking is still ongoing emphasizes the lack of clarity of the Court's case law in this respect.

14. Recital 8 of the Preamble.

15. The same is true of the definitions of "employment representatives" (Art. 2(1)(c)), "contract of employment" and "employment relationship" (Art. 2(2)).

16. Case 105/84, *Mikkelsen*, [1985] ECR 2639 and Case 19/83, *Wendelboe*, [1985] ECR 457.

- (b) they are in employment relationships governed by a fixed-duration contract of employment . . . , or
- (c) they are temporary employment relationships”

This new provision makes clear that part-time and other atypical workers cannot be discriminated against by being excluded from the scope of the Directive: they benefit from the same rights under the Directive as full-time employees, irrespective of what national law may provide in their respect.¹⁷ The lack of a Community-wide definition of employee has been criticized as having “frustrated the aims of those who drafted the Directive”.¹⁸ Indeed, there is a wide variation in the coverage *ratione personae* of the implementing laws of the Directive in the Member States, which may ultimately distort competition, while discriminating against different categories of workers. For instance, it will appear further below that in some Member States employees in the public sector cannot benefit from the protection of the Directive. New Article 2(2) should reduce this variation and consequently is a welcome addition from the point of view of employees’ rights. However, it does not replace a Community-wide definition of the term “employee”, which would have been a better option. The refusal to define such crucial terms for the application of the Directive at Community level is one of the drawbacks of the approach used by the Community to harmonize labour standards. It may deprive some workers (who arguably need it most) of the protection that the Directive provides.

2.3. *Labour intensive sectors of activity*

The Court dealt with five cases in two judgments of 12 December 1998: *Hernandez Vidal*¹⁹ and *Sanchez Hidalgo*.²⁰ The facts of these cases are very similar, for they all dealt with the transfer of economic activities and employees without the transfer of any assets. *Sanchez Hidalgo* concerned the contracting out of home help services and the contracting out of surveillance services at a medical supply depot. In *Hernandez Vidal*, the Court had to consider the contracting-in of three cleaning contracts, i.e. the transfer of an ancillary activity from an outside contractor to the main employer. It was the

17. This is consistent with the requirements of the Community Charter of the Fundamental Social Rights of Workers of 9 Dec. 1989, which is expressly referred to in Recital 9 of the Preamble of the Directive.

18. Hepple, “Report for the Commission of the European Communities Directorate-General Employment, Industrial Relations and Social Affairs – Main shortcomings and proposals for revision of Council Directive 77/187/EEC”, December 1990.

19. *Hernandez Vidal*, cited *supra* note 12.

20. Joined Cases C-173/96 & 247/96, *Sanchez Hidalgo*, [1998] ECR I-8237.

first time that the Court had to deal with contracting-in. Indeed, in its previous cases, it had rather considered contracting-out situations, i.e. the transfer from an employer to an outside contractor of an ancillary activity. The Court held that contracting-in situations should in principle fall within the scope of the Directive in the same way as contracting-out scenarios. This statement is perfectly consistent with both the letter of the Directive (Art. 1(1) does not distinguish contracting-in and contracting-out) and its purpose (the main aim of the Directive is indeed to ensure, as far as possible, that employees' rights are protected in the event of the transfer of an undertaking).

In *Hernandez Vidal* and *Sanchez Hidalgo*, the Court placed a heavy reliance on *Süzen*. Its reasoning can be divided into two main parts. In the first stage of its reasoning, the Court defined the term entity as referring to "an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective". Whilst such an entity must be sufficiently structured and autonomous, it will not necessarily have significant assets: in certain sectors, assets are often reduced to their most basic and the activity is essentially based on manpower. Thus, an organized grouping of wage earners who are specifically and permanently assigned to a common task may, despite the absence of other factors of production, amount to an economic entity. In the second stage of its reasoning, the Court considered whether the economic entity had been transferred. It held, as it did in *Süzen*, that such a transfer can only take place if the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their number and skills, of the employees assigned by his predecessor to that task. The Court emphasized that it was for the referring court to decide both questions, thus reverting to its initial approach in *Spijkers*.

The Court repeated that *Spijkers* formed the basis of its case law. However, it made clear that the issue of what constitutes the transfer of an undertaking must be divided into two clearly identified sub-questions. This seems logical to decide firstly whether there is an economic entity and only then whether the entity has been transferred. Such an analysis is more rigorous than that adopted in *Spijkers*, *Schmidt* or *Süzen* and should help restore the confidence of national courts in the reasoning of the Court on the scope of the Directive. It is noticeable that Advocates General Van Gerven and La Pergola had already suggested in *Redmond Stichting*²¹ and *Süzen* respectively that the transfer of an undertaking was something more than the transfer of its activity. In particular, Advocate General Van Gerven spoke of an "organizational unit", which underlines that the entity transferred must have a certain degree of independence. This idea is quite similar to the definition he proposed of an economic entity in his Opinion in *Schmidt* and which the Court refused to

21. Case C-29/91, *Redmond Stichting*, [1992] ECR I-3189.

follow. Nevertheless, it now seems clear that an economic entity cannot be reduced to the activity entrusted to it. *Schmidt* has not been relied upon or even quoted by the Court in *Hernandez Vidal* or in *Sanchez Hidalgo*, which seems to confirm that it has been implicitly overruled.

Moreover, the Court reaffirmed that a distinction should be drawn between labour intensive and other sectors of activity. In labour intensive sectors, it is legitimate to rely heavily on whether a major part of the workforce is taken over. The rationale is that it is necessary to give some protection to employees notwithstanding the sector of activity they work in. If there are no assets, employees cannot be automatically deprived of any protection; other factors must also be considered.

In these two respects, the Court has successfully clarified its case law in attempting to strike the proper balance between the need to protect employees on transfer and the need to ensure that undertakings are competitive, which should ultimately benefit the workforce. Nevertheless, two important questions still remained at this stage to be dealt with by the Court. The first one concerned the respective importance of the transfer of assets and the transfer of the workforce. The second one was the possibility offered to subsequent employers to avoid the scope of the Directive, which has been mentioned above. The decision of the Court in *Oy Liikenne*²² has partly addressed these concerns.

2.4. Other sectors of activity and remaining problems

Following a tender procedure, YTV awarded the operation of seven local bus routes, previously operated by Hakunilan Liikenne, to Oy Liikenne for three years. Hakunilan Liikenne dismissed 45 drivers, 33 of whom (all those who applied) were re-engaged by Oy Liikenne. Oy Liikenne also engaged 18 other drivers. The former Hakunilan Liikenne drivers were re-engaged on the conditions laid down by the national collective agreement in the sector, which are less favourable overall than those which applied in Hakunilan Liikenne. Two of them claimed that there was a transfer under the Directive and that they should have been re-engaged under the same working conditions as they previously enjoyed. No vehicles or assets connected with the operation of the bus routes concerned were transferred. Oy Liikenne merely leased two buses from Hakunilan Liikenne for two or three months while waiting for the 22 new buses it had ordered to be delivered, and bought from Hakunilan Liikenne the uniforms of some of the drivers who had entered its service. Again, one of the questions the Court had to answer was whether the Directive was applicable.

22. Case C-172/99, *Oy Liikenne*, [2001] ECR I-745.

The sector of bus transport is obviously not labour intensive, as it requires substantial plant and equipment. The Court held that in an industry necessarily dependent on assets, as in this case, the transfer of the majority of the workforce alone could not trigger the application of the Directive. In such sectors, “where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity”. The type of undertaking or business concerned is relevant in assessing whether a transfer has occurred.

It seems that the Court has introduced a hierarchy between the two factors – the transfer of assets and the transfer of the workforce – mentioned in *Süzen* to decide whether a transfer is within the scope of the Directive. For the Court, the criterion of whether the major part of the workforce is taken over is supplementary: it is only if an undertaking can function without any assets that the transfer of a major part of the workforce is crucial in assessing whether the Directive applies. Another interpretation would have been to hold that the transfer of the workforce is as important as the transfer of assets. If such had been the case and if the majority of the workforce had been taken over, as in *Oy Liikenne*, then a transfer could not have been ruled out in principle. The national court would have had to weigh all the facts to reach a conclusion. In *Oy Liikenne*, however, the Court clearly rejected this interpretation. The absence of the transfer of assets in non-labour intensive sectors of activity is sufficient to exclude the transfer from the scope of the Directive. The Court has thus narrowed down the scope of the Directive and distanced itself even further from its extensive ruling in *Schmidt*.

The Court has not directly dealt with the second issue that remained after *Sanchez Hidalgo* and *Hernandez Vidal* relating to the extent to which subsequent employers can avoid the scope of the Directive by refusing to take on the majority of the workforce when they could do so. However, the decision of the Court in *Oy Liikenne* should reduce the ambit of the problem.

As stated above, the test laid down in *Süzen* makes it possible for two subsequent employers to avoid the mandatory provisions of the Directive. The risk of such collusion between transferors and transferees has caused enormous concern in some Member States, and in the United Kingdom in particular.²³ In *ECM v. Fox* most notably,²⁴ the Court of Appeal held that where a contractor refuses to take on employees, an employment tribunal

23. For a fuller account on this case law, see McMullen, “TUPE – Sidestepping *Süzen*”, 28 ILJ (1999) 360 and East, “Transfers and tribulations: *ECM v. Cox* and the difficulties of applying the Acquired Rights Directive and the TUPE Regulations to the contracting out of services”, (2000) ECLR, 170.

24. Decision of the E.A.T. [1998] ICR 631 upheld by the C.A. [1999] ICR 1162.

could look at the motive of the contractor in deciding whether the Directive should apply. If the aim is to avoid its mandatory provisions, the tribunal can decide that there is in fact a transfer. This reasoning illustrates how difficult the application of the *Süzen* test may be in practice.

It is true that this problem has lost some of its importance since the judgment of the Court in *Oy Liikenne*: the reason employers have for refusing to take on employees is now relevant only in cases where assets are not transferred. If, firstly, there is a hierarchy in the criteria used by the Court to decide that a transfer falls within the scope of the Directive and if, secondly, significant assets are not taken over, then there can be no transfer at all. There is consequently no need to enquire into the motive of employers. Conversely, if assets are taken over, the Directive will probably apply and employees should keep their employment. In this respect, the Court has limited the risk in *Oy Liikenne* that two consecutive employers voluntarily set aside the application of the Directive and thus avoid its mandatory provisions.

By way of contrast, the difficulty remains for labour intensive sectors where no assets are required and where the taking over of the workforce is crucial in deciding whether a transfer falls within the scope of the Directive.²⁵ The decision of the English Court of Appeal in *Adi (UK) Ltd v. Willer and others*, concerned with the transfer of security services,²⁶ shows that the problem is still bound to come up. The Court of Appeal upheld its decision in *ECM*: “if the circumstances of an alleged transfer of an undertaking are such that an actual transfer of labour would be a relevant factor to be taken into account in deciding whether there has been a [transfer within the meaning of the Directive], an employment tribunal is obliged to consider the reason why the labour was not transferred”. Consequently, “if the economic entity is labour intensive such that, applying *Süzen*, there is no transfer if the workforce is not taken on, but there would be if they were, the tribunal is obliged to treat the case as if the labour had transferred if it is established that the reason or the principal reason for this was in order to avoid the application of [the Directive]”.

However, it may be argued that the reasoning of the Court of Appeal in *ECM* is flawed. In *Adi*, Lord Justice Simon Brown dissented because he thought it was impossible to reconcile *ECM* with the rulings of the Court. Indeed, as stated above, the Court’s case law clearly requires in the first place that there is an economic entity and in the second place that this entity is transferred. If the tribunal can decide on its own motion that there is a transfer even if the major part of the workforce is not taken over, then the second stage of the enquiry is simply ignored and the decision as to whether a transfer within

25. Davies, “Transfers – The UK will have to make up its own mind”, 30 ILJ (2001), 231.

26. Decision of the Court of Appeal [2001] IRLR 542.

the scope of the Directive has taken place is reduced to an enquiry into the existence of an economic entity. On the other hand, it could be argued that the Directive leaves some degree of freedom to employers in structuring their deal to decide whether or not the Directive should apply. However, this seems to run against the idea that the provisions of the Directive are mandatory, as well as against the protective purpose of the Directive. It is hoped that a national court will soon refer a question to the Court so that it grasps the nettle.

It will be noted as a last remark on *Oy Liikenne* that the Court has solved – again – the case on its specific facts. Even more remarkably, the Court has claimed on the one hand that the assessment of the facts should be left to national courts, while on the other hand expressly deciding how the facts should be assessed in the case. National courts should be entrusted with the application to particular cases of the criteria laid down by the Court. Very detailed considerations of the facts by the Court do not necessarily enhance the proper understanding of the law, as the confusion that followed cases such as *Schmidt* and *Süzen* illustrates. Moreover, the Court should use its precious resources to consider questions of principle, rather than questions of facts.²⁷

2.5. *Subcontracting*

Until recently, the Court had not dealt with the issue of subcontracting. It has just done so in *Temco*.²⁸ In this case, Volkswagen entrusted the cleaning of a number of its production plants to BMV, which subcontracted the cleaning work to its subsidiary GMC. Volkswagen subsequently terminated its contract with BMV and instructed Temco to provide the same services. GMC dismissed most of its staff, part of which were re-engaged by Temco.

Two questions on the applicability of the Directive were referred to the Court. Firstly, the Cour du Travail de Bruxelles asked whether an undertaking had been transferred within the meaning of *Süzen* as subsequently refined. Secondly, the Cour du Travail expressed doubts as to whether the Directive could apply, as it requires “a legal transfer or merger” and GMC never had a contractual relationship with Volkswagen.

The Court’s answer to the first question is not particularly surprising. It relied on its previous cases and ruled that a transfer was within the scope of the Directive provided that the employees taken over were an essential part, in terms of their number and skills, of the employees assigned by the subcontractor to the performance of the subcontract.

27. More generally on the relationship between the Court and national courts, see the Opinion of A.G. Jacobs in Case C-338/95, *Wiener*, [1997] ECR I-6495.

28. Case C-51/00, *Temco*, judgment of 24 Jan. 2002, nyr.

As regards the second question, the Court had already decided on several occasions that the absence of a direct contractual link between the transferor and transferee could not as such preclude a transfer within the meaning of the Directive.²⁹ The facts of *Süzen* illustrate what a triangular situation is: A entered into a cleaning contract first with B and then with C. The Court held that, even if there was no direct contractual link between B and C, there was “a legal transfer or merger” within the meaning of the Directive. The primary purpose of the Directive to protect employees’ rights and the uncertainties resulting from the comparison of the different language versions of the Directive justify that the concept of “a legal transfer or merger” should cover a broad range of situations.³⁰ In *Temco*, however, the issue was slightly more complicated as there were not three but four employers involved – Volkswagen, BMW, GMC and Temco. The Court took the reasoning it had adopted in its previous cases one step further: “the fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since *it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect*” (emphasis added). Subcontracts create links between the contractor and the subcontractor, “which may be legal, as in the case of direct payment, and which are in any event practical links, as in the case of the monitoring and daily supervision of the work done”. Such links are sufficient to characterize “a legal transfer or merger”.

The Court did not follow the Opinion of Advocate General Geelhoed who submitted that subcontracting was of such a nature that it should not fall at all within the scope of the Directive. He argued that the economic circumstances surrounding the subcontracting of services should be specifically taken into account in assessing whether the Directive should be applicable. The subcontracting of services is characterized by the mobility of the work-

29. In *Temco*, the Court quoted Case 324/86, *Daddy’s Dance Hall*, [1988] ECR 739; *Redmond Stichting*, *supra* note 21; Joined Cases C-171 & 172/94, *Merckx and Neuhuys*, [1996] ECR I-1253; Case C-13/95, *Süzen*, [1997] ECR I-1259.

30. The Court has sometimes been severely criticized for taking such a broad view of what “a legal transfer or merger” should cover. For a recent example, see the comments of Lord Justice May in *Adi (UK) Ltd v. Willer and others* [2001] IRLR 542 (Court of Appeal): “It is clear that the state of the European . . . authorities is unsatisfactory. The concept of transfer is now a judicially constructed fiction derived from the purpose of the Directive . . . to safeguard the rights of employees. The requirement in Article 1 of the Directive for the transfer to result from ‘a legal transfer or merger’ has been emasculated out of existence by purposive judicial interpretation. The literal words, and indeed the whole structure, of the Directive appear to require some legal relationship effecting a transfer between the transferor employer and the transferee employer, such as might take place upon the assignment of an undertaking or the sale of a business. But the cases have eliminated the need to look for such an orthodox legal relationship, resulting in confusion and uncertainty.”

force and the requirement to keep the market very flexible. If the Directive was applicable, its objective to protect employees' rights would be given a disproportionate priority over freedom of contract, which would in turn affect the competitiveness of undertakings.

It is submitted that the argument based on the competitiveness of undertakings is not convincing, all the more so as the Court has attempted on several occasions to strike a proper balance between the need to protect employees' rights and the need to ensure competitiveness. Firstly, it held in *Rygaard* that a one-off contract could not fall within the scope of the Directive, as it requires the transfer of a stable economic entity whose activity is not limited to performing one specific works contract.³¹ Secondly, as shown above, the Court has narrowed down the test of whether a transfer of an undertaking has taken place in *Süzen* and subsequent cases precisely to take account of the need to safeguard the competitiveness of undertakings. Finally, the Court has acknowledged that other considerations may have to be given a priority over the protection of employees' rights in specific areas such as insolvency so that economic realities may be reflected.³²

More fundamentally, the approach put forward by the Advocate General seems to be at odds with the primary purpose of the Directive. Indeed, subcontracted employees generally work under precarious employment conditions. That is why they need, more than any other employee, to enjoy the protection provided for by the Directive.³³ Furthermore, excluding subcontracting as a whole from the scope of the Directive would give employers an incentive to resort as often as possible to this cheap, but precarious, method of employment.

3. The relationship of the Directive with other areas of law

3.1. *Refusal by the Court to hold that the scope of the Directive could be restricted by competition law or public procurement law*

3.1.1. *The Directive and Article 81*

In *Allen*,³⁴ the Court was faced for the first time with the applicability of the Directive to undertakings belonging to the same corporate group and, thus, with the relationship between the Directive and Article 81 EC.

ACC and AMS are two wholly owned subsidiaries of the AMCO Group, both involved in driveage work for coal mine owners. In 1994 and 1995,

31. Case C-48/94, *Rygaard*, [1995] ECR I-2745.

32. See below for a more detailed discussion.

33. See McMullen, *op. cit. supra* note 13.

34. Case C-234/98, *Allen*, [1999] ECR I-8643.

ACC submitted a bid to carry out further driveage work for RJB and won it. However, its terms were that the work would be subcontracted to AMS, AMS having lower labour costs than ACC. ACC dismissed 24 workers, including Mr Allen, who were subsequently employed by AMS, but under less favourable terms of employment. These workers showed no enthusiasm whatsoever. ACC consequently decided not to subcontract further work to AMS and re-engaged the 24 workers. Their working conditions were better than with AMS but worse than they originally were. The workers claimed they were entitled in accordance with the Directive to their original conditions of employment.

The Leeds Industrial Tribunal asked whether the Directive could apply to two companies belonging to the same corporate group and having common ownership, management, premises and work or whether such companies were a single undertaking for the purpose of the Directive.

The Court upheld the line of reasoning of Mr Allen and the other applicants. The purpose of the Directive is to ensure as far as possible that the rights of employees are safeguarded in the event of a change of employer. According to the case law of the Court, the Directive is applicable regardless of whether or not the ownership of the undertaking is transferred.³⁵ This interpretation is supported by Article 2 of the Directive which defines a transferor and a transferee without making any reference to undertakings belonging to the same corporate group.³⁶ Since subsidiaries are distinct legal entities, each with specific employment relationships with their employees, the Directive can apply to a transfer between two of them notwithstanding that they belong to a single group.³⁷

Contrary to what ACC suggested, the ruling of the Court in *Viho*³⁸ does not make any difference in this respect. *Viho* concerned a distribution agreement between two firms belonging to the same group. The Court of First Instance held that the Commission correctly classified this corporate group as one economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market. The Court upheld this reasoning and held that Article 81 was not applicable.³⁹ “[F]or the purpose

35. Case 287/86, *Ny Molle Kro*, [1987] ECR 5465 and *Daddy's Dance Hall*, *supra* note 29.

36. A transferor, or respectively a transferee, is “any natural or legal person who, by reason of a transfer within the meaning of Art. 1 ceases to be, or respectively becomes, the employer in respect of the undertaking”.

37. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works does not affect the outcome of the case.

38. Case C-73/95 P, *Viho*, [1996] ECR I-5457. Appeal against judgment of the CFI in Case T-102/92, [1995] ECR II-17.

39. The group's policy, however, could fall under Art. 82 (ex 86) EC if the conditions for its application were fulfilled.

of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities" (emphasis added).⁴⁰ In contrast, the main purpose of the Directive is to protect the rights of employees in case of transfers. Firstly, the Directive is part of the Community's Social Action Programme. Secondly, both its title and its Preamble stress its social purpose.⁴¹ Thirdly, the Court has always emphasized its social objective,⁴² and it stated in *Allen* itself that the aim of the Directive is "to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor". Thus, the focus in interpreting the Directive should be the effect of the transfer on the employees of the undertaking, which is likely to be identical whether the transfer takes place between subsidiaries of the same corporate group or not.⁴³ That is why the purported analogy put forward by ACC could only have supported the applicant's line of reasoning.

3.1.2. *The Directive and Directive 92/50*

In *Oy Liikenne*⁴⁴ the Court adopted a similar approach when faced with the relationship between the Directive and Directive 92/50 relating to the co-ordination of procedures for the award of public service contracts.⁴⁵

Directive 92/50 is intended, as the 20th Recital in its Preamble states, to eliminate practices which are an obstacle to competition between service-providers and to participation in the markets of other Member States. In order to achieve this aim, Directive 92/50 requires the implementation of uniformly applicable rules throughout the Community by all economic entities.

40. The problem with the approach of the Court in *Viho*, however, is that it gives an absolute territorial protection to large corporate structures that can afford to have subsidiaries across Europe. This arguably discriminates against smaller firms that do not have the financial resources to establish integrated distribution systems and thus have to rely on independent distributors. See *Groupe de sociétés*, (1997) *Journal du Droit International*, 596. Nevertheless, it is true that "it is not for the Court, on the pretext that certain conduct, such as that to which the applicant objects, may fall outside the competition rules, to apply Art. [81] to circumstances for which it is not intended in order to fill a gap which may exist in the system of regulation laid down in the Treaty" (Case T-102/92, cited *supra* note 38).

41. "Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded". The amended version of the Directive also refers to the Community Charter of the Fundamental Social Rights of Workers of 9 Dec. 1989 (recital 9 of the Preamble).

42. Most of the cases on the Directive illustrate this point.

43. This is particularly true in cases such as *Allen* where the employment conditions are different with the two consecutive employers.

44. *Oy Liikenne*, *supra* note 22.

45. O.J. 1992, L 61/26.

In this case, Directive 92/50 was applicable, as Oy Liikenne was awarded the contract for the operation of seven local bus routes after a tender procedure by the YTV, a public authority under Article 1(b). The *Korkein oikeus* noted in its order for reference that the application of the Directive in such a context, while protecting the rights of employees, might obstruct competition between undertakings and prejudice the aim of effectiveness pursued by Directive 92/50. This raised the question of the interrelationship of the two directives.

The Court repeated that the Directive primarily aimed at protecting employees' rights in the event of the transfer of an undertaking. To ensure this protection, the Court held that the applicability of the Directive could not be excluded simply by the fact that the contract in question was awarded following a public procurement procedure conducted in accordance with Directive 92/50. The Court noted that the Directive does not provide any such exception to its scope. Nor does Directive 92/50 contain any provision to that effect. The literal interpretation of the two directives in question thus confirms the Court's findings based on the purposive approach to the Directive. Consequently, even if a transaction comes under Directive 92/50, this does not of itself rule out the application of the Directive.⁴⁶

Oy Liikenne submitted that the application of the Directive to awards of road transport services would cause serious problems of legal certainty, as the successful undertaking would have to take on obligations it had no previous knowledge of. Not surprisingly, the Court rejected this argument. As Advocate General Léger stated, "the aim of Directive 92/50 is not to permit the take-over of economic entities to the detriment of the rights of their workforce but to place those service providers who wish to compete for the award of a contract in equal competitive conditions". Directive 92/50 is therefore not intended to exempt contracting authorities and service-providers who offer their services for the contracts in question from all the laws and regulations applicable to the activities at stake, so that offers can be made without any constraints. Operators retain their room to manoeuvre and compete with one another by submitting different bids within an existing legal framework. Even further, contracting authorities have an obligation to inform tenderers of all conditions relating to the performance of a contract, so that tenderers can take them into account when preparing their tenders. Consequently, service-providers know that if they take over an economic entity that has retained its identity, an undertaking will have been transferred within the meaning of the Directive. If such is the case, they will reflect this information in their costing assumptions before fixing the level of their offer. The two directives can therefore be reconciled by reason of their objectives.

46. The Court also referred to the case law of the EFTA Court in Case E-2/95, *Eidesund*, [1996] IRLR 684 and Case E-3/96, *Ask*, O.J.1997, C 136/7.

The Commission has welcomed the decision of the Court in *Oy Liikenne* in its recent “interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement”.⁴⁷ It is true that the public procurement directives currently in force contain little provision on the pursuit of social policy goals within the framework of public procurement procedures. Nevertheless, they permit the exclusion of a tenderer who “has not fulfilled obligations relating to the payment of social security contributions . . .” or who “has been guilty of grave professional misconduct . . .”. Furthermore, the Commission argues that even if social criteria are not included among the various criteria given as examples in the public procurement directives, the term “social criterion” may be construed “as a criterion that makes it possible to evaluate, for example, the quality of a service intended for a given category of disadvantaged persons and may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the public procurement directives”. This supports the view of the Court that the two directives are not mutually exclusive by reason of their objectives.

3.2. *Acceptance by the Court that the scope of the Directive may sometimes be limited*

While the Court has refused to narrow the scope of the Directive in *Allen and Oy Liikenne*, it has accepted that it may be necessary to take into account either the specificity of some activities or the risk that it may be counterproductive to apply the Directive in given circumstances.

3.2.1. *The Directive and public undertakings*

The amendment of the Directive. Directive 98/50 added a new Article 1(1)(c) to the Directive: “this Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganization of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of the Directive”. This new article clearly implements the case law of the Court. Firstly, the Court held in *Redmond Stichting*⁴⁸ that it is not necessary that an undertaking operate for gain to fall within the scope of the Directive. In the same case, the Court also established that its interpretation of the Directive applies to both public and private undertakings irrespectively, which was recently confirmed in *Sanchez Hidalgo*⁴⁹

47. COM (2001) 566 final.

48. *Redmond Stichting*, cited *supra* note 21.

49. *Sanchez Hidalgo*, cited *supra* note 20.

where the city of Guadalajara and the German army were involved. Finally, the Court limited the application of the Directive in *Henke*: the reorganization of public administrative authorities does not come within the scope of the Directive.⁵⁰

This last point deserves further attention. It will be recalled that *Henke* raised the question of whether a municipality was capable of constituting an undertaking within the meaning of the Directive.⁵¹ The Court relied on the First Recital of the Preamble of the Directive and its different language versions to decide that the activities of a municipality were not of an economic nature and could not therefore fall within the scope of the Directive. The Court thus refused to follow the Opinion of Advocate General Lenz who had suggested that the Court should decide the case on the basis of the primary purpose of the Directive – the protection of the rights and interests of employees.⁵² The Court did not adopt the purposive interpretation that it has generally used in the context of transfers of undertakings.⁵³ Moreover, the Court did not sufficiently analyse the implications of its judgment. In particular, the Court did not refer at all to the point made by Advocate General Lenz that in some cases it may be extremely difficult to know in which capacity public authorities act, for example in the case of the privatization of prisons. The Advocate General pointed out that the criterion of activity in the exercise of public powers is very difficult to pin down, since it is subject to change.

“What is today regarded as purely public may, even in a near future, be carried out by a private undertaking with a view to profit. Furthermore, it may be that functions carried out by a private undertaking are later on regarded as being, again, functions of the public authorities. It is therefore scarcely possible to justify the employees carrying out these activities being covered at one time by the protection of the directive and then, following a change of view as to the public character of their activities, no longer enjoying that protection.”

This is reinforced by the fact that there may be a possible margin of interpretation between what can be termed public administration and economic activities. Finally, the Court did not sufficiently deal in *Henke* with what should happen to employees in case all of a local authority's functions – both administrative and economic – are transferred to a new body, as what was actually transferred did not clearly appear either in the judgment of the Court or in the Opinion of Advocate General Lenz. The Court merely said

50. Case C-268/94, *Henke*, [1996] ECR I-4989.

51. De Groot, op. cit. (1998) *supra* note 3.

52. So did A.G. Van Gerven in *Redmond Stichting*, cited *supra* note 21.

53. This is why it has been argued that the Court has narrowed down the scope of the Directive by introducing other tests than the employment tests that it had applied up to 1994: Sergeant, “New doubts about transfers in the public sector”, 26 ILJ (1997) 265.

that “even if it is assumed that the activities [of the Municipality] had aspects of an economic nature, they could only be ancillary”. Such statements raise more questions than they actually solve.

Subsequent case law. Litigation was thus to be expected on the precise scope of *Henke*. The cases of *Mayeur* (Full Court)⁵⁴ and *Collino* (Sixth Chamber)⁵⁵ confirm that while *Henke* is significant when purely administrative functions are transferred, it does not apply to transfers of economic activities involving a public authority.

Mr Mayeur was employed by a non-profit-making association – the APIM – that promoted the City of Metz. To that end, the APIM published and distributed a magazine, for which Mr Mayeur collected funds. Following the transfer of the activity of the APIM to the City of Metz, Mr Mayeur was dismissed. The question arose as to whether the Directive should cover such a transfer to a public administrative body.

Under French law, only employees of undertakings transferred to public institutions of an industrial or commercial nature are covered by the provisions of the Directive. In *Mayeur*, the French Government argued that, although it was an association subject to the rules of private law, the APIM was in reality a public service entrusted with a task in the general interest. Consequently, the taking-over of its activity by the City of Metz should be viewed as a reorganization of the structures of public administration falling within the scope of *Henke*.

The Court rejected this argument and distinguished *Mayeur* from *Henke*. There are three stages in its reasoning. Firstly, the Court confirmed that the Directive could apply to public and private entities, regardless of the legal status of the entity or the manner in which it is funded. The Court took the view that *Henke* only excluded the reorganization of structures of the public administration or the transfer of administrative functions between public administrative authorities. Consequently,

“[the Directive does not] permit the transfer of an economic activity from a legal person governed by private law to a legal person governed by public law to be excluded from the scope of the Directive solely on the ground that the person to whom the activity is transferred is a public-law body”.

To hold otherwise would frustrate the objectives of the Directive that the continuity of employment relations is ensured. Secondly, the Court held that *Mayeur* did not entail the reorganization of structures of the public administration but the transfer of an economic activity between two distinct legal entities. Indeed, the APIM carried out publicity and information activities on

54. Case C-175/99, *Mayeur*, [2000] ECR I-7755.

55. Case C-343/98, *Collino*, [2000] ECR I-6659.

behalf of the City of Metz, which means that it provided “services that are economic in nature and cannot be regarded as deriving from the exercise of public authority”. The Directive was thus applicable in *Mayeur*. However, the Court noted in the third stage of its reasoning that it was for the referring court to decide whether the entity in question had retained its identity and whether the Directive actually applied to the facts of the case. This is the decisive test: an entity cannot, as stated above, be reduced to the activity entrusted to it.

In the case of *Collino*, a telecommunications services operation managed by a public body – the ASST – was transferred to the private company Telecom Italia. Under Italian law, this transfer derogated from the general rules on transfers of undertakings. However, Mr Collino and Ms Chiappero, who were employed by the ASST, claimed that Telecom Italia should have taken them on under the same terms and conditions as they previously enjoyed. By contrast, Telecom Italia argued that no transfer of an undertaking had taken place, firstly, because a public body such as the ASST did not constitute an undertaking and, secondly, because the exercise of the activity in question was subject to the grant of an administrative concession. The question therefore arose as to whether the Italian legislation at stake was compatible with Community law.

The Court quoted *Henke* and reasoned *a contrario*: the fact that the service transferred is the subject of a concession by a public body cannot as such exclude the application of the Directive, insofar as the activity concerned amounts to a business activity rather than the exercise of public authority. Subsequently, the Court relied on some of its competition law cases and applied them by analogy to the facts of the case at hand: the management of public telecommunications equipment and the placing of such equipment at the disposal of users on payment of a fee amount to a business activity, not to the exercise of public authority.⁵⁶ *Collino* and *Henke* should consequently be distinguished, the Directive being inapplicable in the latter case only. Nevertheless, once again, the Court did not conclude on the facts of the case as to whether the Directive should actually apply. Instead, it insisted that it could only be relied upon by persons who were protected as employees under national labour law. However, the case-file in *Collino* seemed to suggest that the ASST’s employees were subject to a public-law status and thus could not benefit from Italian labour law.⁵⁷

56. Case 41/83, *Italy v. Commission*, [1985] ECR 873; Joined Cases C-271/90, C-281/90 & C-289/90, *Spain and Others v. Commission*, [1992] ECR I-5833.

57. See above for further discussion on the lack of a Community-wide definition of the term “employee”.

After *Mayeur* and *Collino*, it seems likely that few transfers will fall within the scope of the *Henke* exclusion.⁵⁸ However, these judgments do not constitute a real change in the interpretation of the Court, they rather confirm it; and doubts remain. Indeed, the Court still has to deal with several of the points that the Advocate General raised in *Henke*. In particular, there are some borderline areas and it may be difficult to distinguish an economic activity from the exercise of public powers. However, on the basis of the Court's case law, this difference is crucial for the employees concerned by a transfer.

3.2.2. *Insolvency situations and the Directive*

The Court has also been given the opportunity since 1998 to refine its case law on the relationship between the law of insolvency and the law on transfers of undertakings.

3.2.2.1. *The case law before 1998*

In *Abels*⁵⁹ the Court held that the application of the Directive to insolvency situations could entail a serious risk of general deterioration in working and living conditions of workers contrary to the objective of the Directive.⁶⁰ Extending the scope of the Directive to insolvency proceedings may thus be counterproductive in dissuading a potential transferee from acquiring an undertaking on conditions acceptable to its creditors, who would then have to sell the assets of the undertaking separately. That would lead to the loss of all the jobs in the undertaking, detracting from the Directive's effectiveness.

On the other hand, it is difficult to define this risk of general deterioration more specifically as there are major differences of opinion with regard to the exact consequences for the protection of employees of applying the Directive to insolvency proceedings. Thus, the Court has held that Member States could apply the provisions of the Directive to a transfer arising in insolvency situations if they wished to do so. Moreover, the Court has refused to exclude pre-insolvency proceedings from the scope of the Directive and has introduced a distinction between different kinds of proceedings.⁶¹ It is necessary to consider the purpose of the proceedings as the determining factor. If their aim is to continue trading, then the Directive should apply, as the risk of general

58. This interpretation of the scope of *Henke* is in line with the view expressed by the UK Government that the exclusion must be very limited. In the Cabinet Guidance of January 2001 "Staff Transfers in the Public Sector", there is indeed a general assumption that the Directive will apply and a policy statement that public authorities should behave as though it applies, even where there is doubt.

59. Case 135/83, *Abels*, [1985] ECR 469.

60. Davies, "Acquired rights, creditors' rights, freedom of contract, and industrial democracy", 9 YEL (1989) 21.

61. *Abels*, cites *supra* note 59; Case C-362/89, *D'Urso*, [1991] ECR I-4105; Case C-472/93, *Spano*, [1995] ECR I-4321.

deterioration in working and living conditions of workers does not exist to a large extent.

3.2.2.2. *The refinement of the Court's case law*

The Court refined its case law further in two 1998 cases, *Déthier* and *Europièces*. In *Déthier*⁶² Mr Dassy was employed by Sovam SPRL, which was wound up by decree of the court. The liquidator dismissed Mr Dassy and subsequently transferred to Jules Déthier Equipement SA the assets of Sovam SPRL under an agreement approved by the court. The Cour du Travail de Liège asked the Court whether the Directive applied. The Court held that the distinction drawn in *D'Urso*⁶³ could not simply be transposed to the facts of *Déthier*: while in *D'Urso* the business was continued with a view to reconstruction, in this case trading was being continued solely with the aim of dissolving the company. The continuation of trade can therefore have different aims that should be taken into account when assessing whether a specific procedure falls within the scope of the Directive. That is why it may not always be appropriate to rely solely on whether or not the undertaking continues trading. The Court relied on its previous case law and held that “in this case, since the criterion relating to the purpose of the procedure for winding up by the court appears not to be conclusive, it is necessary to consider the procedure in detail”. The Court emphasized that the liquidator was an organ of the company who sold the assets under the supervision of the general meeting. Moreover, it noticed that there was no special procedure for establishing liabilities under the supervision of the court. Finally, it pointed out that a creditor could enforce his debt and obtain judgment against the company. By contrast, in the case of insolvency, the administrator is not an organ of the company and he works exclusively under the supervision of the court. Furthermore, the liabilities of the company are established in accordance with a special procedure and a creditor could not enforce his claim individually. The Court thus concluded that the procedure under which an undertaking continues to trade while being wound up by the Court is not an insolvency procedure and therefore falls within the scope of the Directive.

In *Europièces*⁶⁴ the Court applied the same reasoning to a voluntary procedure, noting that “the reasons which led the Court to hold in *Déthier* that the Directive can apply to transfers that occur while an undertaking is being wound up by the Court are all the more pertinent where the undertaking transferred is being wound up voluntarily”.

This distinction between insolvency and pre-insolvency proceedings has been criticized. In particular, Paul Davies noted that if many companies

62. Case C-319/94, *Déthier*, [1998] ECR I-1061.

63. Cited *supra* note 61.

64. Case C-399/96, *Europièces*, [1998] ECR I-6965.

opt for pre-insolvency procedures rather than insolvency procedures, this is because they are more likely to sell off part of their business as a going concern, thus securing some of the jobs involved. And this is precisely what prompted the Court in *Abels* to exclude insolvent companies from the scope of the Directive.⁶⁵ In this respect, the distinction as it currently stands is difficult to sustain.

3.2.2.3. *The amendment of the Directive*

The Directive was nonetheless amended in 1998 to incorporate this distinction. New Article 5(1) provides that “Articles 3 and 4 of the Directive shall not apply to any transfer of an undertaking. . . where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorized by a competent public authority)”.

Nevertheless, the Directive is particularly flexible in this respect insofar as it expressly allows Member States to derogate from Article 5(1) if they wish to apply the Directive to all insolvency situations.⁶⁶ If they decide to do so, however, Article 5(2) allows them to derogate from some provisions of the Directive. In particular, they may limit the protection afforded by the Directive where the transferee or transferor and employee representatives “may agree alterations, in so far as current law or practice permits, to the employees’ terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking. . .” or “where the transferor is in a situation of serious economic crisis, as defined by national law”.

This intervention of the legislature to codify – once again – the case law of the Court in the Directive, while at the same time allowing Member States to derogate from its provisions, shows the tensions and the uncertainties surrounding the consequences of insolvency or similar situations on the viability of an undertaking. The aim is certainly to protect employees’ rights on transfers. However, there is considerable scope for debate as to how this may be best achieved in insolvency situations. The Court and the legislature are still struggling to strike the proper balance.

65. Davies, op. cit. (1989) *supra* note 60.

66. Implementation of the Court’s case law. E.g. *Abels*, cited *supra* note 59.

4. The rights protected under the Directive and the remedies available for its breach

The Directive grants three kinds of rights to the employees covered by the Directive:

- employment contracts or employment relationships are transferred automatically with the same terms and conditions (Art. 3);
- dismissals by reason of the transfer alone are prohibited (Art. 4);
- employees representatives have the right to be informed and consulted on a transfer (Art. 7).

During the period under scrutiny, the Court dealt exclusively with the individual rather than with the collective rights protected under the Directive. However, the Community legislature has amended the Directive in relation to the latter.

4.1. Collective rights protected under the Directive

New Article 7(1) provides that the transferor and the transferee must inform employee representatives of the date (or proposed date) of the transfer, the reason for the transfer, the implications of the transfer for the employers and any measures envisaged in relation to the employees. This information must be provided “in good time”. Moreover, New Article 7(2) states that “where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of the employees in good time on such measures with a view to reaching an agreement”. It is notable that the wording of this clause has been changed from “with a view to seeking an agreement” to “with a view to reaching an agreement”. This change may indicate that the employer has a duty to take the proposals of employee representatives into further consideration. Finally, under New Article 7(4), the obligation to inform or consult employee representatives of a transfer of an undertaking applies “irrespective of whether the actual decision to transfer the undertaking was taken by the employer or an undertaking controlling the employer”.

New Article 7(5) is another example of the flexibility allowed by the Directive: Member States may limit the obligation laid down in paragraphs 1 and 2 to undertakings which, in terms of number of employees, “meet the conditions for the election or nomination of a collegiate body representing the employees”.

Where there are no employee representatives, the obligation to inform is enhanced. Indeed, New Article 7(6) states that in such cases the relevant employer must inform all the affected employees in advance of the same information which would otherwise be given to employee representatives. One may wonder why in this Article the term “in advance” is used, whereas

Article 7(1) uses “in good time”. This is even more surprising as New Article 7(6) makes it a condition that the absence of employee representatives should be through no fault of the employees in the undertaking. But how long “in advance” should the affected employees be provided with the requisite information?

4.2. *Individual rights protected under the Directive*

4.2.1. *The Commission’s proposals for reform*

Some changes were put forward by the Commission but failed to materialize. In particular, the Commission suggested that the transferor and the transferee should be jointly liable in respect of obligations arising before the transfer. Unfortunately, this suggestion did not go through: Member States may provide for joint liability but they do not have to do so. Such a change would have been beneficial to employees, for it would have avoided the confusion regarding which employer they should sue for a breach of the Directive. This would have enhanced their protection, especially in the case of insolvency of an employer, and would have thus been consistent with the assertion that the main purpose of the Directive is to protect employees’ rights on transfers. On the other hand, the failure of this reform is not really surprising, as Article 94 (ex 100) EC, requiring unanimity, remains the legal basis of the Directive.

4.2.2. *Case law of the Court*

The case law of the Court since 1998 on the rights protected by the Directive has not given rise to particularly new issues. In *Europièces* and in *Temco*, the Court has reiterated its previous case law on the right for employees to object to their transfer.⁶⁷ However, it is worth discussing the issue of remedies that should be made available for a breach of Articles 3 and 4 of the Directive, even if the Court has not yet been called upon to consider the issue directly, as it has given rise to controversies in Member States.

4.2.3. *The Directive and unfair dismissals*

4.2.3.1. *The case of Déthier*

In *Déthier*⁶⁸ the Tribunal du Travail de Liège asked the Court whether the defence available to employers in case of economic, technical and organizational reason entailing changes in the workforce (the ETO reason) could apply

67. *Europièces*, cited *supra* note 63 and *Temco*, cited *supra* note 28. On the right of employees to object to their transfer, see in particular Joined Cases C-132/91, 138/91 & 139/91, *Katsikas v. Konstantinidis*, [1992] ECR I-6577, commented on by De Groot, *op. cit.* (1998) *supra* note 3.

68. *Déthier*, *supra* note 62.

both to dismissals effected by the transferor before the transfer as well as to dismissals effected by the transferee after the transfer. The uncertainty originated in the wording of Article 4(1) of the Directive. As the Advocate General emphasized, the first sentence of Article 4(1) – which prohibits dismissals on ground of the transfer alone – applies to both the transferor and the transferee, whereas the second sentence – which permits dismissals for an ETO reason – does not indicate whether that right is conferred on the transferor, on the transferee or on both. The Court held that the power to dismiss employees for an ETO reason belongs to the transferor and to the transferee alike.⁶⁹ This outcome is logical. If both the transferor and the transferee are prevented in principle from dismissing their employees on a transfer of an undertaking, it is fair that they can both benefit from the exception to the rule.

The subsequent statement of the Court in *Déthier* is more controversial: “employees unlawfully dismissed shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was *unlawful*” (emphasis added). This statement could be seen – and has been by some⁷⁰ – as giving a hint about the remedies that should be available in national legal systems for a breach of Articles 3 and 4 of the Directive.

This statement is not sufficient on its own to dispose of the issue of remedies. Indeed, the Court was not directly called upon in *Déthier* to rule on this issue. However, in the light of the controversies that it has already raised in some Member States, it is likely (and hoped) that the Court will be given a more straightforward opportunity to do so in the near future.

The Directive states in Article 4 that “the transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee”. Furthermore, Article 9 provides that “Member States shall introduce in their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities”. What should consequently be the remedies available to employees? If the transfer is automatic, dismissals are “unlawful”, as the Court held in *Déthier*. But what should “unlawful” entail in this context? Should it mean that the employee should keep his employment? Would compensation be an effective remedy? And if so, at what level? Articles 4 and 9 alone do not provide answers to these questions.

69. The Court relied on Case C-101/87, *Bork*, [1988] ECR 3057.

70. See in particular the English Court of Appeal in *Wilson and Baxendale*, [1997] IRLR 505. See also Cavalier, *Transfer Rights: TUPE in Perspective* (The Institute of Employment Rights, 1997), at p. 64.

4.2.3.2. *The case of Commission v. UK*

The only direct opportunity the Court has had so far to deal with remedies for a breach of the Directive arose in the case of *Commission v. UK*.⁷¹ However, the question referred on this point concerned the failure of the United Kingdom to provide for effective sanctions in case of a failure to inform and consult workers' representatives rather than the remedies for a breach of Articles 3 and 4 of the Directive.

In this case, the Court relied on its general case law and held that when the Community

“does not provide any specific penalty in case of breach but refers on this matter to national provisions, the Member States retain discretion as to the choice of penalties. However, under Article [10 (ex 5)] of the Treaty, which requires Member States to take all measures necessary to guarantee the application and effectiveness of Community law, they must ensure that infringements of a Community regulation are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive”.

The Court thus reaffirmed that the principle of procedural autonomy is subject to two qualifications: firstly, that individuals should not be discriminated against according to whether their claim is based on national or Community law, and secondly that the remedies provided by national law must be effective.

4.2.3.3. *The case law of the Court on sex equality*

The case law of the Court in matters of sex equality illustrates the extent to which the Court is ready to intervene to ensure that remedies are effective so that individuals can exercise their Community rights. Useful analogies can be drawn with transfer cases.

The Court ruled in *Von Colson*⁷² that the effectiveness principle was two-fold: firstly, the remedies granted under national law must be such as to compensate adequately the individual who has suffered a loss (the employee); secondly, the remedies must be such as to have a deterrent effect on the party in breach of their obligations (the employer). The Court went one step further in *Marshall II*.⁷³ The main question was whether a limit on recoverable damages – which were not purely nominal, as was the case in *Von Colson* – violated the principle of effectiveness of Community law. The Court held that

71. Case C-382/92, *Commission v. UK*, [1994] ECR I-2435. See De Groot, op. cit. (1997) *supra* note 3.

72. Case C-14/83, *Von Colson*, [1984] ECR 1891.

73. Case C-271/91, *Marshall II*, [1993] ECR I-4367.

it was contrary to Article 6 of the Equal Treatment Directive⁷⁴ for national provisions to lay down an upper limit (which seems to mean any limit) on the amount of compensation recoverable by a victim of discrimination in respect of the loss and damage sustained. The Court held that real equality of opportunity could not be attained in the absence of measures appropriate to restore such equality when it has not been observed, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal. The upper limit therefore had to be set aside.

Interestingly, Advocate General Van Gerven reached the same result on the facts of the case, but the Court did not uphold his reasoning in its entirety. Indeed, the Advocate General said:

“the fact that the compensation should in any event be ‘adequate in relation to the damage sustained’ must however mean, in my view, also that the Court . . . is prepared to accept less than compensation for the full damage sustained. In other words, the compensation must be adequate in relation to the damages sustained but does not have to be equal thereto. . . . To lay down upper limits on compensation is, as Community law stands, not unlawful. However, the precondition is that the limit should be pitched high enough in order to deprive the sanction of its ‘effective, uniform and deterrent’ nature and does not prevent its being ‘adequate in relation to the damage’ normally sustained as a result of an infringement”.

It seems that the Court went further by prohibiting upper limits on the amount of recoverable compensation as such. On the other hand, the Court agreed with the Advocate General that a Member State is free to provide the remedy it prefers.

4.2.3.4. *The analogy in transfer cases*

The Court’s reasoning in *Marshall* could be transposed to transfer cases, all the more so as Article 9 of the Directive is worded in the same way as Article 6 of the Equal Treatment Directive. It seems that, in the present state of Community law, Member States are free to decide whether an employee unlawfully dismissed should be reinstated in his previous job, re-engaged in another job or compensated for the loss he suffered as a result of his employer’s breach of the Directive.⁷⁵ However, *Marshall* seems to suggest that there should be no upper limit on the amount of damages recoverable. It is submitted that the law of unfair dismissal as it currently stands in the United

74. Directive 76/207, O.J. 1976, L 39/40.

75. Such has been the view expressed by Lord Slynn, both as an A.G. in *Wendelboe*, *supra* note 16, and as a Law Lord in *Meade and Baxendale*, [1998] 4 All ER 609.

Kingdom could be challenged on this basis. Indeed, the Employment Rights Act⁷⁶ sets an upper limit on the damages recoverable for unfair dismissal. It is true that the amount of the compensatory award has recently been increased to £ 51,700.⁷⁷ Nevertheless, even in the unlikely event that upper limits could still be sustained after *Marshall*, such a limit may not always be adequate compensation. This is especially true in view of the fact that an employee who is unfairly dismissed loses not only his job and his salary but also the continuity of employment required to claim unfair dismissal against his future employer.⁷⁸ It was suggested in the *Fairness at Work* White Paper that the upper limit to the compensatory award should be abolished.⁷⁹ This would be in line with the amendment of the main anti-discrimination statutes⁸⁰ and would enable individuals to be *fully* compensated for their losses.⁸¹

5. Conclusion

The Court still has to answer several questions concerning the interpretation of the Directive. Two cases brought under Article 234 EC are currently pending before the Court, but they will not address all the issues mentioned in this article.⁸² The Directive is of partial and minimum harmonization only. This gives an important degree of flexibility to Member States but also leaves important gaps in the protection of employees' rights on the transfer of an undertaking. The controversies surrounding this dynamic area of the law are clearly illustrated by the tensions in the Court's case law and their acceptance by the Community legislature. The question of the extent to which this area can, and should, be further harmonized at Community level still remains to be answered.

76. ERA 1996, ss. 112–132 on the remedies available for unfair dismissal.

77. ERA 1996, s. 124(1) as amended by SI 2000/21.

78. At least one year of continuous employment is required before being able to benefit from the protection of the law on unfair dismissals. It used to be two years until the amendment of section 108(1) of the ERA 1996 by SI 1999/1436.

79. *Fairness at Work*, 1998, CM 3968, para 3.5. See Deakin and Morris, *Labour Law* (Butterworths, 2001), at p. 494.

80. Sex Discrimination Act 1975 as amended following *Marshall II* by SI 1993/2798; Race Relations (Remedies) Act 1995; Disability Discrimination Act 1995.

81. Sir John Donaldson P once said that the aim of the compensatory award was “to compensate, and to compensate fully.” (*Norton Tool Co Ltd v. Tewson* [1972] ICR 501).

82. Case C-164/00, *Beckman*; Case C-340/01, *Abler and Others*. Moreover, the Commission has threatened to start proceedings against Italy for the defective implementation of Directive 98/50.